

MOBIL EXPLORATION & PRODUCING U.S., INC.

IBLA 90-208

Decided April 5, 1991

Appeal from a decision by the Wyoming Acting Deputy State Director, Bureau of Land Management, affirming a decision by the Platte River Resource Area Manager assessing a Federal lessee the full value of vented gas found to have been avoidably lost. WY-90-04.

Reversed in part, affirmed in part, and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties: Payments

A finding that a lessee must pay the United States for the full value of vented gas that was avoidably lost from 1980 to 1984 is reversed, because 43 CFR 3162.7-1(d), issued in October 1984, changed Departmental policy to require that compensation for avoid-ably lost gas shall be limited to payment of the royalty value of gas so vented. Because the 1984 regulation changed the prior policy, which had been to assess vented gas at full value, affected lessees who would benefit by the amended rule are allowed the benefit of the change.

2. Administrative Authority: Generally--Appeals: Jurisdiction--Board of Land Appeals--Judicial Review

A statute establishing time limitations for commence-ment of civil actions for damages by the United States does not apply to limit administrative review within the Department of the Interior.

APPEARANCES: Robert A. Luetngen, Esq., Dallas, Texas, and Charles L. Kaiser, Esq., Denver, Colorado, for appellant; Michael F. Deneen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Mobil Exploration & Producing U.S., Inc. (Mobil), has appealed from an October 25, 1989, decision by the Wyoming Acting Deputy State Director, Division of Mineral Resources, Bureau of Land Management (BLM), finding that Mobil should pay the United States the full value of gas vented from the Bear Creek No. 1 well on lease No. WYW-089382 from April 1, 1980, to October 21, 1984. It is undisputed that the gas was vented without authorization. The only question before us on appeal is whether compensation should be paid for the full value of the vented gas, or whether payment of the royalty value for the gas would satisfy the requirements of law.

On August 3, 1989, BLM's Platte River Resource Area Manager notified Mobil that an audit of the Bear Creek Unit revealed that Mobil had avoid-ably lost gas which it had reported flared because of compressor failure. The Area Manager found that:

We have calculated the maximum allowable flared volumes under the provisions of NTL-4A and determined from that figure any excess flared volumes * * *. From this analysis we have determined that between the dates of April 1, 1980 thru October 21, 1984, that avoidably lost gas (excess flared volume) total 9,139 MCF. You will be assessed full value on this amount of production. Since

October 21, 1984 to the present, we have determined avoidably lost gas totaled 19,791 MCF. You will be assessed royalty value of this amount of production.

From this decision, Mobil appealed to the State Director, whose office conducted a hearing on October 11, 1989. The Acting Deputy State Director set aside so much of the Area Manager's decision as assessed compensatory royalty from January 1985 to September 1987, but, pertinent to this appeal, affirmed the determination that full value should be assessed from April 1980 to October 21, 1984, explaining, concerning this aspect of the case, that:

We agree with the Area Manager's interpretation. The longstand-ing practice of assessing compensation that equals the full value of the avoidably lost gas is clearly stated in the Mineral Leasing Act of 1920, as amended in 1931, Section 1(h). Apparently, at that time, and in an attempt to discourage waste, the Department deemed it necessary to assess full value compensation for avoidably lost gas. The fact that the percentage value due the government exceeds the royalty rate may be construed as a "penalty." As oil and gas prices began to rise in the late 70's and early 80's, the Department concluded that assessing only the royalty value for avoidably lost gas would be a sufficient deterrent, in most cases, to insure that an operator would not waste gas that is economically feasible to market. We affirm the Area Manager's decision to assess compensation that equals the full value of the avoid-ably lost gas for the period from April 1, 1980, to October 22, 1984 (the effective date of the revised regulations at 43 CFR 3162.7-1(d).

(Decision at 3).

Pertinently, 43 CFR 3162.7-1(d) provides that one in the position of Mobil "shall be liable for royalty payments on * * * gas lost or wasted from a lease." BLM argues that this regulation, however, may not be applied

retroactively, because to do so would disparage other provisions of the Mineral Leasing Act not repealed by enactment of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757 (1988), the statute implemented by 43 CFR 3162.7-1(d).

[1] Similar arguments were rejected by this Board in Conoco, 115 IBLA 105 (1990), where it was urged that retroactive application of a rule more generous to a Federal lessee than the rule it replaced would be in derogation of past policy in effect before the rule change. Rejecting this argument and a parallel contention that retroactive application of the new rule would overrule past decisions of the Department that implemented the prior rule, we found that "the Department may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases." Id. at 106. Insofar as the argument that to do so would derogate the effect of prior law, we reasoned that "[i]t [the prior rule] has now been amended; thus, the law has changed. The only question is whether [the appellant] should have the benefit of the change. * * * there is ample authority for providing an affected party with the benefits of a regulatory change." Id. at 107 n.3.

We also gave retroactive effect to policy changes in the administration of oil and gas royalty payments involving vented gas in Ladd Petroleum Corp., 107 IBLA 5 (1989). In that case, compensation for avoidably lost gas was at issue. Setting aside the BLM decision finding that payment was due the United States Government as described by NTL-4A Part I, we ordered BLM to reconsider whether the gas had been avoidably lost in light of the

fact that Departmental policy had changed. We explained that, while the new policy had not been in effect when the decision under review had issued, the regulatory change made necessary a reconsideration of the question of payment because the newly promulgated rules

reflect the present policy of BLM concerning the proper application of NTL-4A and the regulations on which it is based to make determinations of avoidably lost gas. In the past, this Board has applied an amended version of a regulation to a pending matter if to do so would benefit the affected party, and if there were no countervailing public policy reasons or intervening rights. James E. Strong, 45 IBLA 386 (1980). The rationale for such an action is equally appropriate here where BLM has indicated a change in its policy regarding the application of NTL-4A concerning avoidably lost gas which would benefit appellants, and there are no countervailing regulations, public policy considerations, or intervening rights. See Somont Oil Co., Inc., 91 IBLA 137 (1986).

Id. at 8.

The case under review is such a case. As we pointed out in Conoco, supra, to give retroactive application to the 1984 regulation in this case also permits us to avoid an inequitable inconsistency in administration of this gas lease, since to do otherwise would allow assessment of two different rates of compensation for gas vented at the No. 1 well although the only distinction between the two very different charges is the passage of an instant of time at midnight on October 21, 1984. On the record before us, we find that the application of 43 CFR 3162.7-1(d) will not adversely affect intervening rights or prejudice the interests of the United States, and is not in derogation of prior law, but a proper implementation of existing law after amendment.

[2] Mobil also argues that the limitation on actions provided by 28 U.S.C. § 2415 (1988), bars recovery of compensation on gas flared by Mobil before August 3, 1983. This statute, which governs civil actions for money damages brought by the United States, does not affect the administration of this Federal lease by BLM. Whether the manner in which the flared gas audit was conducted was so slow that it would bar recovery in some hypothetical suit for damages we are unable to say, nor is it "within our authority to decide" such a question. Alaska Statebank, 111 IBLA 300, 312 (1989). An appeal to this Board is in no sense the commencement of an action for damages: it is the continuation and conclusion of administrative review that began in the Area BLM office with the audit of Mobil's operation of the Bear Creek Unit No. 1 well. Our review is conducted on behalf of the Secretary, pursuant to Departmental regulation, and is not a commencement of an action for damages. The purpose of our review in the instant case is limited to a determination, on the record before us, of how compensation due the United States should be calculated. See 43 CFR 4.1. We do not hold that there are no limits on the time that may be spent in administrative review, but only find that, in this case, there has been no showing that any limit on such review set by law has been infringed. On March 1, 1989, Mobil was placed on notice that an audit of the No. 1 well had taken place. Thereafter, it has vigorously defended its interests before the Department. There has been no showing that it was denied the right to participate effectively in the administration of the affected lease. See generally Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed in part, affirmed in part, and the case file is remanded to permit computation of the amount of royalty due on gas avoidably lost from Bear Creek Unit No. 1 well between April 1, 1980, and October 21, 1984.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge